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**In the Supreme Court of the  
United States**

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**October Term, 1977  
No. 77-44**

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**BARNES & TUCKER COMPANY,**  
*Appellant*

**v.**

**COMMONWEALTH OF PENNSYLVANIA,**  
*Appellee*

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*On Appeal From the Supreme Court of Pennsyl-  
vania, Middle District.*

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**OPPOSITION TO MOTION FOR  
LEAVE TO FILE BRIEF AMICI CURIAE**

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Motion

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## IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

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BARNES & TUCKER COMPANY,

*Appellant*

v.

COMMONWEALTH OF PENNSYLVANIA

*Appellee*

*On Appeal From the Supreme Court of Pennsylvania,  
Middle District*

## MOTION IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The Commonwealth of Pennsylvania, Appellee, moves that this Court deny for the following reasons the motion of the Keystone Bituminous Coal Association *et al.* ("Coal Associations") for leave to file a brief as *amici curiae* in support of the Jurisdictional Statement filed by Barnes & Tucker Company ("Barnes & Tucker"), Appel-  
lant.

### ARGUMENT

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#### Motions To File Amicus Briefs Prior to Consideration of Jurisdictional Statements Are Not Favored

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Rule 42 (1) of the rules of this Court states that motions for leave to file *amicus* briefs prior to consideration of jurisdictional statements "are not favored". Coal Associations' motion gives no reasons whatsoever why this strong presumption against the filing of *amicus* briefs prior to consideration of jurisdictional statements should not be applied in this case.

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#### Coal Associations' Motion Is Out of Time

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Rule 42 (1) of the rules of this Court also states that motions for leave to file *amicus* briefs prior to consideration of jurisdictional statements "may be filed *only* if submitted *a reasonable time* prior to the consideration of the jurisdictional statement" (emphasis added).

Barnes & Tucker's Jurisdictional Statement was filed on July 5, 1977.

Coal Associations, however, did not submit their motion for leave to file an *amici* brief until on or about September 13, 1977, and did not serve their motion on opposing counsel until September 15, 1977, a delay of two and one-half months. Coal Associations' motion does not even attempt to explain this unreasonable delay.

#### No Amicus Briefs Were Filed Below

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No coal company, association or any other party requested to file an *amicus* brief at any stage of the proceedings below.

It is especially noteworthy that even the one moving *amicus* which represents certain of Pennsylvania's mine operators—the Keystone Bituminous Coal Association—did not attempt, until the Coal Associations' very-last-minute motion, to in any way participate at any stage of the proceedings below or in this Court.

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#### Coal Associations' Motion Is Redundant

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The arguments which Coal Associations' dilatory motion asks this Court to consider are the same ones raised in Barnes & Tucker's Jurisdictional Statement. Therefore, any *amici* brief filed by Coal Associations would be redundant, burdensome, unhelpful, and unnecessary to the consideration of the jurisdictional statement in this case.

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#### Coal Associations' Motion Is Irrelevant to This Case Because the Arguments It Asks This Court To Consider Would Require This Court To Act as a Pennsylvania Appellate Court and Even Sit as a Chancellor in Equity

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Coal Associations' motion assumes and depends upon factual findings and legal findings on points of Pennsyl-



vania law which are contrary to the dispositive findings of the Pennsylvania Supreme Court ("Pa. Supreme Court") in this case.

For example, Coal Associations' motion claims that the decision below raises the question of the application of "recently adopted environmental laws". It raises no such question. The Pa. Supreme Court dispositively found that Pennsylvania's common law of public nuisance—one of the independent bases of Barnes & Tucker's liability in this case—at all times provided for the abatement of acid mine drainage discharges.<sup>1</sup> 455 Pa. at 417, 319 A.2d at 884; A. 94. Coal Associations' motion, like Barnes & Tucker's Jurisdictional Statement, simply ignores this dispositive finding and, instead, raises exactly the same arguments on this point of Pennsylvania law which Barnes & Tucker presented below and which the Pa. Supreme Court rejected.<sup>2, 3</sup>

<sup>1</sup> Moreover, Barnes & Tucker itself recognized its responsibilities in abating discharges of mine drainage when it represented under oath to the Commonwealth that it would seal all mine openings in a watertight manner to prevent post-mining discharges. Despite this sworn representation, Barnes & Tucker's polluting discharge first occurred from a borehole which Barnes & Tucker never sealed. 9 Pa. Commonwealth Ct. 1, at 15, 303 A.2d at 551; A. 22-23, 26-27.

<sup>2</sup> In any event, as the Pa. Supreme Court also dispositively stated, under well-established principles of Pennsylvania law "... stream polluters can acquire no prescriptive or property right to pollute as against the Commonwealth ..." (citations omitted.) 455 Pa. at 415, 319 A.2d at 884; A. 92-93.

<sup>3</sup> Without reaching the merits of Coal Associations' proposed *amici* brief, we further note that it also asks this Court to consider the very same arguments on points of Pennsylvania law which Barnes & Tucker presented below and which the Pa. Supreme Court rejected.

Coal Associations' motion also bleats about burdens Pennsylvania is allegedly placing upon "one of its most essential industries". Even assuming, contrary to established principles and practice, that this Court can and should inquire into the social merits of a state police power regulation, Coal Associations' vaguely proposed argument has no support of any kind in the record. Because the Pennsylvania courts specifically found that Barnes & Tucker failed to adduce any evidence whatsoever regarding the economic impact upon the company itself of the requirement to abate the polluting discharge caused by its mining activity, 23 Pa. Commonwealth Ct. 496, at 511-512, 353 A.2d at 480; A. 113-114; 371 A.2d at 468; A. 129-130, any argument that the requirement has an impact upon Barnes & Tucker, much less any wider impact, is completely unsupported by the record.

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**Coal Associations' Motion Is Irrelevant to This Case  
Because the Arguments It Asks This Court To Consider  
Would Require This Court To Act as the Pennsylvania Legislature**

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Most importantly, Coal Associations' dilatory motion, like Barnes & Tucker's Jurisdictional Statement, does not in any manner propose to make arguments challenging the interest of Pennsylvania's public and industry in abating discharges of acid mine drainage.

Moreover, Coal Associations' dilatory motion, like Barnes & Tucker's Jurisdictional Statement, does not in any manner propose to make arguments challenging the form of relief fashioned by the chancellor in this case. In-

deed, it cannot. Barnes & Tucker not only failed to present any evidence concerning alternative methods of abating its polluting discharge, 371 A.2d 461, at 468; A. 129-130, but itself chose and constructed the method of abatement according to the terms of a stipulation it entered into with the Commonwealth, 371 A.2d at 464; A. 121-122.

In short, the representations of Coal Associations' motion, like the arguments in Barnes & Tucker's Jurisdictional Statement, amount to nothing more than a request that this Court make the legislative decision that the requirements of Pennsylvania law regarding Pennsylvania's worst water pollution problem are unwise. As argued in the Commonwealth's Motion to Dismiss or Affirm, the correctness of these decisions of social policy is beyond the scope of this Court's review.

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## CONCLUSION

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For the foregoing reasons, Appellee moves that this Court deny the Motion of the Keystone Bituminous Coal Association, *et al.*, for Leave To File a Brief *Amici Curiae*.

Respectfully submitted,

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